Supreme Court, U.S.
FILED
MAR 1 1972
E. ROBERT SEAVER, CLERK

No. 71-916

In the Supreme Court of the United States

OCTOBER TERM, 1971

HERBERT KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530

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After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on seven counts charging conspiracy to defraud the government (18 U.S.C. 286), perjury (18 U.S.C. 1621), subornation of perjury (18 U.S.C. 1622), and filing a false claim against the United States (18 U.S.C. 287). He was sentenced to two years' imprisonment.[1] The court of appeals affirmed

[1] The charges arose out of a claim for return of cash bail which was filed by petitioner's daughter. She claimed, and petitioner supported her claim, that the money belonged to her and not to petitioner, and therefore was not subject to tax liens against petitioner.

per curiam without oral argument (Pet. App. 1a-2a).

Petitioner contends that he was improperly denied appointment of counsel to assist in his defense although he admits that he could not qualify as a pauper. At petitioner's arraignment on February 20, 1970, he asked for release of funds which were subject to tax liens. The government pointed out that, several years before, a week after petitioner had said he had no money to operate his business, he was arrested and found to have over $70,000 in cash and negotiable instruments in his pocket as well as business cards of three Swiss bank agents (Feb. 20, Tr. 9).[2] The court offered to appoint counsel for petitioner, but petitioner said that, if he could not have counsel of his own choosing, he would represent himself (Feb. 20, Tr. 15-16). The court released petitioner on an unsecured $5,000 bond but subsequently refused to permit petitioner to travel to Europe (Feb. 20, Tr. 16, 22-24). Permission was later granted and petitioner did in fact go to Europe.

Trial of the case was set for July 15, 1970. At a pre-trial conference on July 9, 1970, the court told petitioner that no continuance would be granted if petitioner did not have a lawyer. That afternoon petitioner left with the judge a letter formally requesting a continuance and stating that he had arranged for counsel (July 10, Tr. 3). The case was continued on condition that the attorney enter an appearance (July 10, Tr. 12).

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[2] We are filing copies of the pertinent transcripts.

After the case was continued to October, the attorney filed a motion to strike his appearance on the basis of a letter from petitioner that petitioner was unable to pay his fee and wished to represent himself (Oct. 12, Tr. 10-12). Petitioner did represent himself at trial.

After conviction, petitioner asked for appointment of counsel on appeal but the district court found that petitioner was not without funds. It noted that a letter from petitioner's counsel with respect to petitioner's tax liabilities indicated that there would be a settlement "which would seem to indicate that there are funds available somewhere" (March 18, 1971, Tr. 9). The court of appeals offered to appoint counsel for petitioner if he would file the affidavit of indigency but petitioner declined to do so.[3]

It is evident from these facts that petitioner could have had counsel if he wished one, but deliberately chose to act as his own attorney. Moreover both the district court and the court of appeals were willing to appoint counsel for petitioner if he was in fact, as he claimed, a pauper, but petitioner was, as he admits, unable to state under oath that he was a pauper.[4]

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[3] The clerk also suggested that petitioner could employ the attorney who was representing him before the Fourth Circuit with respect to his civil tax liability.

[4] Petitioner has not shown that denial of oral argument of the appeal infringed his constitutional rights or was an abuse of discretion by the court of appeals. *Payton* v. *United States*, 425 F. 2d 1324 (C.A. 5), certiorari denied, 400 U.S. 957.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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